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Desert Aggregates and Operating Engineers Local No. 3, International Union of Operating Engineers, AFL-CIO. Cases 32-CA-18653 and 32-CA-18726

December 31, 2003

ORDER GRANTING MOTION FOR RECONSIDERATION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 23, 2003, the National Labor Relations Board issued a Decision and Order in this proceeding, finding, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off Mark Gregg and Wendy Miller.¹ The Board ordered the Respondent to pay Gregg and Miller backpay from the dates of their unlawful layoffs until the dates of recall letters that the Respondent sent several months later.² On October 17, 2003, the General Counsel filed a Motion for Reconsideration, asking the Board to amend the Order to provide its traditional remedy—full backpay until such time as the Respondent tenders valid offers of reinstatement. The Respondent has not opposed the motion.

In support of the motion, the General Counsel contends that the Board's remedial language implicitly treated the Respondent's recall offers to Gregg and Miller as valid offers sufficient to relieve the Respondent of any additional reinstatement and backpay obligations, see *Consolidated Freightways*, 290 NLRB 771, 771-772 (1988), but that the Board did not make any specific findings or conclusions regarding the validity of the offers. The General Counsel further argues that the Respondent's recall offers are insufficient to relieve it of its backpay and reinstatement obligations and that the Board should modify its remedial order accordingly. However, the General Counsel appears to concede that the Respondent should be permitted to address the issue of the offers' validity in compliance proceedings. We find merit in the General Counsel's contention.

The Board's Rules and Regulations provide that a party may, because of "extraordinary circumstances," move for reconsideration of a Board decision and that, in making such a motion, the party must "state with particu-

larity the material error claimed." See Section 102.48(d)(1). We agree with the General Counsel that the Board erred in determining the extent of the Respondent's remedial obligation without first deciding the underlying question of the recall offers' validity. We also agree that this inadvertent error is material, in that it may result in Gregg's and Miller's being denied appropriate make-whole relief. See, e.g., *St. Regis Paper Co.*, 301 NLRB 1236 (1991). Because this issue may properly be dealt with in compliance, we leave its resolution to the compliance phase of this proceeding. See, e.g., *Modern Iron Works*, 281 NLRB 1119, 1119 (1986); *Home Insulation Service*, 255 NLRB 311, 314 and fn. 12 (1981). We therefore grant the General Counsel's Motion for Reconsideration and modify our amended remedy and Order accordingly.

CORRECTED AMENDED REMEDY

Substitute the following corrected amended remedy for the amended remedy:

"In addition to the remedies recommended by the judge, we shall order the Respondent to take the following affirmative action. Having found that the Respondent unlawfully laid off Mark Gregg and Wendy Miller, we shall order the Respondent, if it has not already done so, to reinstate them and to make them whole for their loss of earnings from the dates of their unlawful layoffs until the date on which the Respondent makes or has made valid reinstatement offers to them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent will be required to remove from its records all references to the unlawful layoffs of Gregg and Miller and to notify them in writing that this has been done and that the layoffs will not be used against them in any way."

ORDER

The General Counsel's Motion for Reconsideration is granted. Accordingly, the Board's Order is modified and the Respondent, Desert Aggregates, Ducor, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Within 14 days from the date of this Order, offer, if it has not already done so, Mark Gregg and Wendy Miller full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

¹ 340 NLRB No. 38.

² The Board also denied the General Counsel's request for a *Gissel* bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The General Counsel does not seek reconsideration on this issue.

“(b) Make Mark Gregg and Wendy Miller whole, with interest, for their loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the corrected amended remedy.”

2. Substitute the attached notice for that in the Decision and Order.

Dated, Washington, D.C. December 31, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit and promise to remedy employee grievances in order to discourage union membership or activities.

WE WILL NOT lay off employees because of their union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer, if we have not already done so, Mark Gregg and Wendy Miller full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark Gregg and Wendy Miller whole for their loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Wendy Miller and Mark Gregg, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

DESERT AGGREGATES